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# Conflict of Laws--Apparent Trends in Jurisdiction

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# STUDENT NOTES

## CONFLICT OF LAWS—APPARENT TRENDS IN JURISDICTION

Previous notes in this series concerning the bases of jurisdiction in cases involving conflict of laws have dealt with presence,<sup>1</sup> appearance,<sup>2</sup> doing business,<sup>3</sup> and the doing of an act.<sup>4</sup> In addition to a consideration of the general problems in each concept, an effort has been made to determine whether each can be brought within the physical power analysis of Justice Holmes.<sup>5</sup> The concepts of allegiance, domicile and consent remain to be considered in the same manner and apparent trends in the field of jurisdiction noted.

*Allegiance.* Probably the clearest instance of jurisdiction based on allegiance is *Blackmer v. United States*.<sup>6</sup> Blackmer, a citizen of the United States resident in France, was personally served by the American counsel with a subpoena to appear as a witness in a trial in which the government was a party. Upon Blackmer's failure to appear, a large amount of his property was seized by the government by way of penalty for contempt. The United States Supreme Court, in affirming the lower court, said that the ". . . United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it . . .".<sup>7</sup>

Prior to this decision a series of cases involving the extra-territorial operation of federal criminal and tax laws had been decided on the basis of citizenship.<sup>8</sup> The jurisdictional power was said to arise out of the ". . . relation as citizen to the United States and the relation of the latter to him as citizen."<sup>9</sup>

It would appear that allegiance as a basis for jurisdiction is proper only when the state *in its sovereign capacity* has an interest in the suit. The statute under which Blackmer was subpoenaed was so limited. Extraterritorial power is the exception rather than the

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<sup>1</sup> Note (1945) 33 Ky. L. J. 126.

<sup>2</sup> *Ibid.*

<sup>3</sup> Note (1945) 33 Ky. L. J. 182.

<sup>4</sup> Note (1945) 33 Ky. L. J. 316.

<sup>5</sup> *McDonald v. Mabey*, 243 U. S. 90 (1917).

<sup>6</sup> 284 U. S. 421 (1932).

<sup>7</sup> *Id.* at 437.

<sup>8</sup> *Cook v. Tait*, 265 U. S. 47 (1924); *U. S. v. Bowman*, 260 U. S. 94 (1922). For a later case see *U. S. v. Flores*, 289 U. S. 137 (1933); cf. *Skiriotes v. Florida*, 313 U. S. 69 (1941).

<sup>9</sup> *Cook v. Tait*, 265 U. S. 47, 56 (1924).

rule and it is believed that it should be relied upon only in extreme cases. It is doubted, therefore, whether it should be used to secure jurisdiction over a defendant in a suit between individuals. While there is at least one case between private parties in which jurisdiction seems to have been based on allegiance,<sup>10</sup> it has not been generally followed and it may well be an improper application of the theory.

*Domicile.* Another concept, one related to that of allegiance, by which jurisdiction over an absent defendant can be secured is that of domicile.

The *Restatement of Conflict of Laws*<sup>11</sup> expresses the rule as to domicile thus: "A state can exercise jurisdiction through its courts over an individual domiciled within the state, although he is not present within the state." This is subject, of course, to the usual requirement that service be in a manner reasonably calculated to give notice to the defendant of the suit.<sup>12</sup>

The rule has been justified as one of necessity for the reason that otherwise an individual by absenting himself from the state could avoid liability.<sup>13</sup> Some courts have refused to recognize this doctrine,<sup>14</sup> at least one declaring a statute so providing to be a violation of the federal constitution.<sup>15</sup> On the other hand, the courts of a number of states have approved it.<sup>16</sup>

The attitude of the Supreme Court of the United States remained in doubt until 1940. *McDonald v. Mabee*<sup>17</sup> was an unsatisfactory test in that the defendant had left the state which sought to exercise jurisdiction for the purpose of establishing a domicile elsewhere and for the additional reason that the method of service was not one reasonably calculated to give the defendant notice.

In 1940, however, the court in *Milliken v. Meyer*<sup>18</sup> held that an *in personam* judgment based on domicile and personal service outside the state was entitled to full faith and credit. In an opinion

<sup>10</sup> *Ousley v. Leigh Valley Trust and Safe-Deposit Co.*, 84 Fed. 602 (E. D. Pa., 1897). It is believed that this case could and perhaps should have been decided on domicile.

<sup>11</sup> *RESTATEMENT, CONFLICT OF LAWS* (1934) sec. 79.

<sup>12</sup> *Id.* at sec. 79, comment b.

<sup>13</sup> *GOODRICH, CONFLICT OF LAWS* (2d ed. 1938) 158.

<sup>14</sup> *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345 (1896); *McCormick v. Blaine*, 345 Ill. 461, 178 N. E. 195 (1931); *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494 (1911).

<sup>15</sup> *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494 (1911).

<sup>16</sup> *Northern Aluminum Co. v. Law*, 157 Md. 641, 147 Atl. 715 (1929); *In re Hendrickson*, 40 S. D. 211, 167 N. W. 172 (1918). For a case involving service where the defendant was concealing himself within the state, see *Roberts v. Roberts*, 135 Minn. 397, 161 N. W. 148 (1917).

<sup>17</sup> 243 U. S. 90 (1917).

<sup>18</sup> 311 U. S. 457 (1940).

which indicates the analogy between allegiance and domicile the court said:<sup>19</sup>

"As in the case of the authority of the United States over its absent citizen (*Blackmer v. U. S.* . . .) the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. . . . The responsibilities of that citizen arise out of the relation to the state which domicile creates. That relation is not dissolved by mere absence from the state. . . . One such incident of domicile is amenability to suit within the state during sojourn without the state. . . ."

*Rawstorne v. Maguire*<sup>20</sup> illustrates a trend which is becoming increasingly apparent. A New York statute provided for substituted service upon a "natural person residing within the state". It was contended that residence was used as a synonym for domicile but the court rejected the contention saying that residence was less than domicile and that bodily presence was sufficient to satisfy the meaning of residence. That this is a new view there can be no doubt for no longer ago than 1918, Professor Beale stated the rule to be that a statute using the word residence, in order to be valid, must be construed to mean domicile.<sup>21</sup>

Although, historically, domicile has been considered essential in divorce actions, *Williams v. North Carolina*<sup>22</sup> approaches the residence test.<sup>23</sup> If the *Rawstorne* and *Williams* cases mean that residence within the state, which amounts to little more than presence, is sufficient ground upon which to found a judgment, the law is certainly entering a new stage. It is true that presence within the territorial limits meets the physical power test and when it is coupled with a method of service reasonably calculated to give notice, it may well be that the defendant should not be allowed to defeat jurisdiction simply by the defense that he was not personally served.

*Consent.* It is well established that parties cannot confer upon a court jurisdiction over causes of action not within its power.<sup>24</sup> It is equally well recognized, however, that, broadly speaking, jurisdiction over the parties may be conferred by their consent.<sup>25</sup>

The entering of an appearance is frequently regarded as consent to jurisdiction. This problem is discussed in a previous note<sup>26</sup> in which it is suggested that presence is a better rationalization. Whether acceptance of service is in itself enough to constitute con-

<sup>19</sup> *Id.* at 463, 464.

<sup>20</sup> 265 N. Y. 204, 192 N. E. 294 at 295.

<sup>21</sup> Beale, *Residence and Domicile* (1918) 4 IOWA L. BULL. 3, 6.

<sup>22</sup> 317 U. S. 287 (1942).

<sup>23</sup> For this view see Note (1945) 33 KY. L. J. 123.

<sup>24</sup> RESTATEMENT, CONFLICT OF LAWS (1934) sec. 81, comment g.

<sup>25</sup> *Id.* sec. 81.

<sup>26</sup> Note (1945) 33 KY. L. J. 126.

sent is made a question of fact by the *Restatement*.<sup>27</sup> At first impression it seems that it should be made a question of law rather than of fact. But to say either that acceptance of service always amounts to consent, or that it can never amount to consent, would probably be less accurate than to say that whether or not it amounts to consent depends upon the circumstances.

In addition to the procedural aspects of consent, consent may arise out of an express agreement. Perhaps the most common example of express consent is the confession of judgment provision frequently contained in a promissory note. Although some states, as a matter of policy, refuse to permit a confession of judgment,<sup>28</sup> others hold that jurisdiction is thus conferred upon the court by the consent of the parties<sup>29</sup> and the resulting judgment is entitled to full faith and credit.<sup>30</sup> In such states a judgment can be rendered against an absent defendant who is without notice<sup>31</sup> or even against a defendant who was in the jurisdiction and was not served.<sup>32</sup> This is justified on the ground that the defendant voluntarily dispensed with service, yet it is seriously doubted whether, as a matter of policy, one should be allowed to contract away the requirement of reasonable notice. Reasonable notice and opportunity to defend may well be so basic in our law that a judgment without these requirements should not be valid even though the parties have in fact consented.

The doing of business and the doing of an act are sometimes said to imply consent to service but, as in the case of appearance, it is believed that presence within the state is a more sound explanation of jurisdiction in these cases.<sup>33</sup>

Agreements to submit future disputes to certain stated tribunals present another type of consent. It is likely that agreements to refer disputes to arbitrators will become more common, the problem presented being similar to the confession of judgment cases. In *Gilbert v. Burnstine*<sup>34</sup> the New York court held a party bound by an award made by an English Arbitration Board as a result of a clause in a contract so providing. If the requirements of reasonable service are met, it may well be that such agreements represent a sound development in the law. It is significant that in the *Gilbert* case the New York Chamber of Commerce presented briefs *amicus curiae* in support of the validity of the award.<sup>35</sup>

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<sup>27</sup> RESTATEMENT, CONFLICT OF LAWS (1934) sec. 81, comment c.

<sup>28</sup> KRS (1944) sec. 372.140.

<sup>29</sup> *Egley v. Bennett*, 196 Ind. 50, 145 N. E. 830 (1924); *Morrison v. First National Bank of Taos*, 28 N. M. 129, 207 Pac. 62 (1922).

<sup>30</sup> *Egley v. Bennett*, 196 Ind. 50, 145 N. E. 830 (1924).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Morrison v. First National Bank of Taos*, 23 N. M. 129, 207 Pac. 62 (1922).

<sup>33</sup> Note (1945) 33 Ky. L. J. 316.

<sup>34</sup> 255 N. Y. 348, 174 N. E. 706 (1931).

<sup>35</sup> Note (1931) 31 Col. L. R. 679.

*Summary.*

To the bases of jurisdiction previously discussed we have now added those of allegiance, domicile, and consent. Out of the allegiance a citizen owes his sovereign arises the power of the state, when its interests are involved, to extend the operation of its laws to absent citizens. The analogous theory of domicile enables one of the states of the United States to render judgments against a defendant who, though absent, is actually domiciled within its borders. While some courts use the fiction of implied consent to jurisdiction in cases which can more accurately be based on presence, express consent (by contract) may confer jurisdiction as in the confession of judgment and arbitration cases. However, it seems that there is a strong policy against jurisdiction in any case not based on reasonable notice and opportunity to defend.

Can the above bases of jurisdiction reasonably be brought within the physical power analysis of Justice Holmes? If by physical power is meant only the actual power to seize and imprison the defendant, obviously the analysis must fail. But physical power, having existed at one time, may be said to continue although the defendant has since left the state. Or it may exist in the sense of power over the subject matter of the suit as in *in rem* proceedings or in the sense of power over the situs of the transaction as in the doing of an act cases. When considered in these various aspects it is possible that physical power exists in all cases in which jurisdiction is properly exercised.

In the *Blackmer* case the court said that the United States had power to require the return of a citizen but what the court actually held was that the sovereign had the right to seize property *within its boundaries* by way of penalty for failure to appear. An examination of the cases in which the allegiance basis of jurisdiction was properly applied indicates that power existed over the person—as in the criminal cases—or over his property—as in the *Blackmer* case.

The very essence of the domicile rule is physical power over the defendant's domicile and once the concept of power over the person of the defendant is abandoned, domicile presents no difficulty so far as the Holmes' analysis is concerned.

When a defendant makes an appearance, he is actually within the power of the court. When a foreign corporation does business within the state or when an individual does an act within the state out of which jurisdiction arises, the parties are present within the state when the transaction occurs and the situs of the transaction remains within the territorial jurisdiction of the court.

The express consent cases present the greatest difficulty in respect to the physical power concept. It is true that in both the confession of judgment cases and the arbitration cases the subject matter of the action (the note or the contract) is before the court and the defendant can be said to have consented that jurisdiction

over the subject matter will be sufficient. While the cases which allow the defendant to contract away the requirement of notice may be fundamentally wrong, it is also possible that the exigencies of modern commercial transactions will lead to the gradual recognition of the power to contract, that jurisdiction over the subject matter, when accompanied by notice, is sufficient to support a judgment.

"The foundation of jurisdiction is physical power . . .," said Justice Holmes. It has been seen that, in its broad sense, physical power can be said to exist in all cases in which jurisdiction is properly exercised.

#### *Apparent Trends in Jurisdiction*

This is the final note in a series dealing with the problem of jurisdiction in conflict of laws. After this somewhat detailed study, at least three fairly well defined trends are apparent:

First, perhaps the most striking is the trend away from the requirement of personal service within the territorial limits of the court. This is undoubtedly the result of the greater mobility of the nation's population in recent years. Without some relaxation of the strict requirement of personal service, there would be many situations in which it would be desirable to impose liability but in which it could be avoided merely by making personal service within the jurisdiction impossible, as in the absent motorist cases.

Second, the general move away from technical rules toward a test of what is reasonable under the circumstances is reflected in the tendency to hold that service is sufficient if it is reasonably calculated to give notice of the suit and opportunity to defend. It seems likely that the more practical tests of residence—or even presence—will replace the technical rule of domicile.

Third, the recognition of the doctrine that jurisdiction can be conferred upon a court by the express consent of the parties is a reflection of the needs of present civilization and the desire to encourage amicable settlements rather than to discourage them by setting up technical requirements which are difficult to meet. Thus even the basic concept of jurisdiction responds to changing conditions and adapts itself to the needs of the times.

These considerations lead to the conclusion that a new test is being developed for jurisdiction as it relates to conflict of laws. While the courts still use the traditional bases, they have been greatly extended and the probability of further extension is already apparent. It therefore seems possible that in the future a court will be said to have jurisdiction to render a personal judgment if the parties and/or the subject matter are before the court, and if the defendant has been served in a manner reasonably calculated to give him notice and if he has a reasonable opportunity to defend.

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